

**STATE OF INDIANA
CIVIL RIGHTS COMMISSION**

WILSON SHERELS,
Complainant,

vs.

**DOCKET NO. EMra20100718
EEOC NO. 24FA10032**

MICHAEL RUDICH,
Individually and d/b/a
MOBILE JAMZZ;
Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On March 6, 2003, Robert D. Lange, Administrative Law Judge (ALJ) for the Indiana Civil Rights Commission (ICRC), entered his Proposed Findings Of Fact, Conclusions Of Law, And Order (the proposed decision).

No objections have been filed to the ICRC's adoption of the proposed decision.

Having carefully considered the foregoing and being duly advised in the premises, the ICRC hereby adopts as its own the findings of fact, conclusions of law, and order proposed by the ALJ in the proposed decision, a copy of which is attached hereto and incorporated herein by reference.

INDIANA CIVIL RIGHTS COMMISSION

COMMISSIONER

COMMISSIONER

COMMISSIONER

COMMISSIONER

Dated: 25 April 2003

To be served by first class mail on the following parties:

Wilson Sherels
c/o Lucille Raines
947 North Pennsylvania Street
Indianapolis, IN 46204

Michael Rudich, individually and d/b/a Mobile Jamzz
9133 Pendleton Pike
Indianapolis, IN 46236

Michael Rudich, individually and d/b/a Mobile Jamzz
8077 Middle Bay Lane
Indianapolis, IN 46236

and to be personally served on the following attorney of record:

Michael C. Healy, Staff Counsel
Indiana Civil Rights Commission
Attorney for Complainant Wilson Sherels
Indiana Government Center North
100 North Senate Avenue, Room N103
Indianapolis, IN 46204-2255

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**PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND ORDER**

A hearing on damages was held before the undersigned Administrative Law Judge (ALJ) for the Indiana Civil Rights Commission (ICRC) on February 5, 2003. Complainant, Wilson Sherels (Sherels), was present. Michael C. Healy, Staff Counsel at the ICRC, appeared in the public interest on behalf of Sherels. Respondent – Michael Rudich, individually and d/b/a as Mobile Jamzz (Rudich) – did not appear, by counsel or otherwise.

Sherels' oral motion to amend the complaint to name Rudich as listed above was granted. Sherels waived his opening statement and testified on his own behalf. During the presentation of Sherels' case, Complainant's Exhibit 1 (CX__), CX2, CX3, CX4, and

CX5 were admitted into evidence without objection. Sherels waived closing argument. The ALJ ordered that Sherels file what he suggested that the ALJ enter as proposed findings of fact, conclusions of law, and order on or before February 19, 2003. The cause was taken under advisement.

On February 19, 2003, Sherels filed Complainant's [Suggested] Findings Of Fact, Conclusions Of Law, And Order.

Having carefully considered the foregoing and being duly advised in the premises, the ALJ proposes that the ICRC enter the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. Sherels has been, at all material times, an adult African-American man residing in the state of Indiana.
2. Rudich is an Indiana for profit business engaged in a business that including cleaning and detailing limousines and cabs. There is no evidence that Rudich, at any material time, employed less than 6 persons for wages or salary within the state.
3. The body of Sherels' complaint reads as follows:
 - I. On May 12, 2000, I walked off my job as detailer. I had worked for Respondent for eight years.
 - II. I walked off the job after owner Michael Rudi (*sic*), white, kicked me in the groin.
 - III. I believe Respondent discriminated against me on the basis of my race, black, because:
 - a. Rudi (*sic*) had told me to do a job; I told Rudi (*sic*) I really did not want to take this job. Rudi (*sic*) reacted with anger and called me a "black M.F." Rudi (*sic*) then kicked me as I started to walk away.
 - b. I had a previous confrontation with Rudi (*sic*) about two years ago. Rudi (*sic*) cursed me after his car was sprayed with dust.
 - c. Rudi (*sic*) also had verbal confrontations with two black employees, Winston _____ and Pierre Williams.

- d. Rudi (*sic*) never talked to the white employees the way he talked to the black employees.

COMPLAINT OF DISCRIMINATION (October 24, 2000).

4. On or about October 16, 2002, the ICRC sent a NOTICE OF COMPLAINT (NOTICE) to Rudich at both his residential and business addresses. APPLICATION FOR ORDER BY DEFAULT (APPLICATION), Exhibit A. The NOTICE enclosed a copy of Sherels' complaint, as amended and advised Rudich that he "must file a written answer to the complaint within twenty (20) days of receipt of the complaint" and that "[f]ailure to file a written answer to the complaint within twenty (20) days will be deemed an admission of all allegations in the complaint; and upon proper application to the Commission, an Order by Default may be entered for the Complainant." APPLICATION, Exhibit A.
5. On October 26, 2002, the NOTICE sent to Rudich's principal place of business was returned to the ICRC bearing the notation "MOVED LEFT NO ADDRESS".
6. On November 2, 2002, the NOTICE sent to Rudich's residential address was returned to the ICRC bearing the notation "UNCLAIMED". APPLICATION, Exhibit C.
7. Rudich did not answer or otherwise respond to the amended complaint.
8. On December 4, 2002, Sherels filed the APPLICATION.
9. On December 12, 2002, the ALJ issued his NOTICE OF PROPOSED DEFAULT ORDER (NPDO).
10. The NPDO notified Rudich that he could file a written motion requesting that the proposed default order not be entered not be imposed within 7 days after service of the NPDO. NPDO, ¶2.
11. Rudich did not file such a written motion.
12. On January 7, 2003, the ALJ issued his ORDER BY DEFAULT AND NOTICE OF HEARING ON DAMAGES.
13. The COMPLAINT sets out a *prima facie* case that Sherels was constructively discharged from his job on the basis of race.
14. At the time of his discharge, Sherels was being paid at the rate of \$325.00 per week.

15. Had Sherels not been constructively discharged by Rudich, he would have earned a total of \$46,280.00, gross, as of the date of the Hearing. This is 142 weeks and 2 days (or 142.4 weeks) times \$325.00.

16. After leaving his job with Rudich, Sherels sought similar work at other locations. He was eventually hired by Dunhill Temporary Systems of Indianapolis, LP (CX1), Crown Hill Cemetery (CX2, CX5), and CBS Personnel Services, LLC (CX3, CX4). From these sources, Sherels earned a total of \$24,441.84, gross.

17. Sherels lost a total of \$21,838.16 as a result of being constructively discharged by Rudich because of his race.

18. Sherels also lost the use of the income he would have earned from Rudich.

19. Interest is the way to compensate someone for the loss of use of money to which the person was entitled. Calculated at simple interest at the rate of 8%, compounded annually, Sherels is entitled to interest, up to the date of the Hearing On Damages, in the amount of \$5,132.96, calculated as follows:

2000	$\$21,838.16 \times .08 \times 33/52$	\$1108.71
2001	$\$22,946.87 \times .08$	1835.75
2002	$\$24,782.62 \times .08$	1982.61
2003	$\$26,765.23 \times .08 \times 5/52$	<u>205.89</u>
TOTAL		\$5132.96

20. Sherels does not seek employment with Rudich.

21. Any Conclusion Of Law that should have been deemed a Finding Of Fact is hereby adopted as such.

CONCLUSIONS OF LAW

1. The ICRC has jurisdiction over the subject matter and the parties.

2. Sherels and Rudich are each a "person" as that term is defined in section 3(a) of the ICRL. IC 22-9-1-3(a).

3. Rudich is an “employer” as that term is defined in the ICRL. IC 22-9-1-3(h).
4. A party may be defaulted under the Administrative Orders and Procedures Act (the AOPA) for failure to file a responsive pleading required by rule. IC 4-21.5-3-24(a)(1).
5. The ICRC’s Rule 6.1 provides, in material part, that “[w]hen a party has failed to plead or otherwise defend as provided by these rules, after proper notice, and that fact is made to appear by affidavit or otherwise, the party may be defaulted”. 910 IAC 1-6-1.
6. Default is appropriate under 910 IAC 1-6-1.
7. Default is also appropriate under IC 4-21.5-3-24(a)(1).
8. The effects of an order by default include that the allegations of the complaint are deemed admitted.
9. The ICRL defines what is an unlawful discriminatory practice at section 3(l), which provides, in material part, as follows:

“Discriminatory practice” means:

 - (1) the exclusion of a person from equal opportunities because of race ...;

...

Every discriminatory practice relating to ... employment ... shall be considered unlawful unless it is specifically exempted by this chapter.

IC 22-9-1-3(l).
10. Causing the constructive discharge of an employee because of race is a discriminatory practice under the ICRL. Because there is no applicable exemption for such a practice, it was unlawful. IC 22-9-1-3(l).
11. If the ICRC finds that a person has committed an unlawful discriminatory practice, it shall issue an order requiring the person to cease and desist from that practice and to take further affirmative action as will effectuate the purposes of the ICRL, which may include restoring complainant’s losses and requiring respondent to file proof of compliance. IC 22-9-1-6(k)(A).
12. Sherels has proven that he sustained lost earnings that were the proximate result of the proven unlawful discriminatory practice.

13. The loss of the use of wages is a part of the loss that a discriminatee incurs when the wages are lost. Thus, the awarding of interest to compensate for the loss of the ability of the victim to use the wages wrongfully denied is within the authority of the ICRC.
14. Interest should be awarded at an annual rate of 8% compounded annually. This is the rate provided for in IC 24-4.6-1-103, a statute that is appropriate to consult in the absence of a more specifically applicable statute. *Indiana Insurance Company v. Sentry Insurance Company* 437 N.E.2d 1381 (Ind. App. 1982).
15. The burden of proof on the issue of mitigation of damages is on the wrongdoer. *Colonial Discount Corp. v. Berkhardt* 435 N.E.2d 65 (Ind. App. 1982).
16. Administrative review of this proposed decision may be obtained by parties who are not in default by the filing of a writing specifying with reasonable particularity each basis for each objection within 15 days of after service of this proposed decision. IC 4-21.5-3-29(d).
17. Any Finding of Fact that should have been deemed a Conclusion of Law is hereby adopted as such

ORDER

1. Rudich shall cease and desist from terminating employees because of race.
2. Rudich shall deliver to the ICRC a cashier's check payable to the ICRC, as escrow agent for Sherels in the amount of \$26,971.12. Of this amount, \$21,838.16 shall be subject to deductions required by law and/or agreement.
3. The management and any supervisory personnel of Rudich shall attend a professionally developed seminar approved by the ICRC's Executive Director addressing the recognition, elimination, and treatment of unlawful sexual harassment. Rudich shall obtain the Executive Director's approval no later than 180 days after the effective date of this Order and all appropriate personnel shall have attended the seminar no later than 300

days after the effective date of this order. Proof of attendance shall be filed with the ICRC.

5. Rudich shall post and maintain, on bulletin boards normally used to disseminate employee information, a bold print statement of policy on non-discrimination. Such statement shall include the following:

It is the policy of Mobile Jamzz to provide equal employment opportunity to all individuals regardless of race, religion, color, sex, disability, national origin or ancestry. This equal employment opportunity refers to all applicable company practices, including employee recruiting, hiring, transferring, training, promoting, disciplining, terminating, and all other conditions or privileges of employment.

The selection of persons for positions at Mobile Jamzz is to be based on the qualifications and abilities required in the job.

Further, it is the policy of Mobile Jamzz to expand and increase efforts of the company to promote the realization of equal employment opportunity through a positive and continuing program.

6. Rudich shall notify, in writing, all supervisory personnel and departmental managers of the policy set out in paragraph 5 of this Order. This Notice shall make it clear to the supervisory personnel and departmental managers that any deviation from these policies and procedures will be cause for disciplinary action, up to and including possible discharge.

7. Rudich shall report, in writing, to ICRC, when the undertakings outlined in paragraph numbers 4 through 6 of this Order have been accomplished. The report will describe the manner in which the undertakings were carried out, and include copies of the documents required by this Order. This report shall be submitted not later than September 1, 2003.

8. This Order shall take effect immediately after it is approved and signed by a majority of the members of ICRC, unless it is modified by ICRC pursuant to IC 4-21.5-3-31(a), stayed by ICRC under 4-21.5-3-31(b), or stayed by a court of competent jurisdiction.

Dated: 06 March 2003

Robert D. Lange
Administrative Law Judge

To be served by first class mail this 6th day of March, 2003 on the following parties:

Wilson Sherels
c/o Lucille Raines
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Indianapolis, IN 46204

Michael Rudich, individually and d/b/a Mobile Jamzz
9133 Pendleton Pike
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8077 Middle Bay Lane
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and to be personally served on the following:

Michael C. Healy, Staff Counsel
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Attorney for Complainant Wilson Sherels
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